THE RECORD
OF THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK

EDITORIAL BOARD

WHITNEY NORTH SEYMOUR, *President* | PAUL B. DE WITT, *Executive Secretary* | ALFRED P. O'HARA, *Secretary*

THE RECORD is published at the House of the Association, 42 West 44th Street, New York 36.

Volume 7 March 1952 *Number 3*

Association Activities

MATTERS UNDER consideration by the Committee on Administrative Law, Lloyd K. Garrison, Chairman, are: procedures under the Immigration Act, procedures of the various Emergency Agencies, the problem of the overlapping of jurisdiction of various Federal Agencies, a study of the various requirements of formal procedures in adjudication under the Federal Administrative Procedure Act, the relationship of the Bar and the administrative system, and a State Administrative Procedure Act.

AT THE Stated Meeting on March 11 memorials for Robert P. Patterson will be presented by Judge Learned Hand and Edward S. Greenbaum. There will also be a presentation of the Association's medal to commemorate Judge Patterson's exceptional contributions to the honor and standing of the Bar in this community. The Committee on Labor and Social Security Legislation, David L. Benetar, Chairman, will present a report on clarification of jurisdictional lines between the National Labor Relations Board and the New York State Labor Relations Board. The Committee on Professional Ethics, James H. Halpin, Chairman, will propose an amendment to Canon 27. Interim reports

will be received from the following Committees: Special Committee on Atomic Energy, Bethuel M. Webster, Chairman; Committee on the Domestic Relations Court, Sylvia Jaffin Singer, Chairman; Joint Committee on Legal Referral Service, Orison S. Marden, Chairman; Committee on Medical Jurisprudence, Edmund T. Delaney, Chairman; and Committee on the Municipal Court of the City of New York, William G. Mulligan, Chairman.

At its January meeting the Committee on International Law, Dana C. Backus, Chairman, had as its guest Robert Vogeler. Mr. Vogeler discussed with the Committee certain aspects of his experience and trial in Hungary. He also compared the procedures used in his case with those in the trial of Mr. Oatis. At the conclusion of his remarks Mr. Vogeler presented for the Association's library an autographed copy of the official transcript of his trial.

The Committee also has under study a report on the establishment of a Standing Mixed Claims Commission.

The photographic show of the Committee on Art, Samuel A. Berger, Chairman, will open on March 18, and the Annual Exhibition of Paintings will open on May 1.

The committee on Insurance Law, James B. Donovan, Chairman, plans to present to the Annual Meeting on May 13 a comprehensive report on compulsory automobile insurance.

The committee on taxation, John P. Ohl, Chairman, has submitted to the Congress a report on the proposed reorganization of the Bureau of Internal Revenue. In the opinion of the Committee the objectives of the reorganization plan are laudable and the administrative arrangements give promise of improved ef-

ficiency. The Committee points out in its report that the reorganization plan can only be effective if it insures to trial counsel adequate notice and the right to be heard.

THE SPECIAL COMMITTEE on Military Justice, Arthur E. Farmer, Chairman, entertained the three judges of the new United States Court of Military Appeals, Chief Judge Robert E. Quinn, Judge George W. Latimer, and Judge Paul W. Brosman. Representatives from the Committees on Military Justice of the American Bar Association and the New York County Lawyers' Association were also present. The Committee discussed with the guests procedures before the Court.

THE COMMITTEE on the Bill of Rights, George S. Leisure, Chairman, met with representatives of the press to discuss problems relating to press comment on pending litigation. As a result of the discussion the Committee will continue its studies in this field.

JUDGE ARTHUR MARKEWICH of the City Court and Mr. William Nash, Deputy Clerk of the Court, met with the Committee on the City Court of the City of New York, Lester E. Denonn, Chairman, to discuss problems which are to be anticipated as a result of the increase of cases referred to the Court after the jurisdictional limit of the City Court has been raised to $6,000.

THE COMMITTEE on Copyright, Joseph A. McDonald, Chairman, submitted to Congress a statement in support of H.R. 4059 amending Title 17 of the U. S. Code entitled Copyrights with respect to the provisions relating to manufacture. The Committee, however, recommended that the provisions of the present Sections 22 and 23 relating to the *ad interim* protection of books

or periodicals published abroad be retained for the benefit of citizens of the United States and aliens domiciled in the United States.

ON FEBRUARY 15 the Committee on Entertainment, Boris Kostelanetz, Chairman, and the Committee on Junior Bar Activities, John V. Lindsay, Chairman, sponsored a Valentine Dance at the House of the Association which was well attended and proved to be an extremely pleasant occasion. The next event on the program of the Committee on Entertainment is the Annual Association Night Show which will be held on April 23.

THE JOINT COMMITTEE for Entertainment of the American Bar Association meeting that was held in New York last September has asked that the following notice be published:

> The Committee for Entertainment of the American Bar Association last September was horrified when the audit disclosed a surplus: Total collected, $35,047; Total disbursed, $22,234. This miracle was largely due to the underwritings of $500 each by a dozen New York City law firms. All of them have indicated that whatever might be refundable to them shall be distributed equally between The Legal Aid Society and the National Legal Aid Association. Refunds will be made to any other contributor who so requests from Paul B. De Witt, Treasurer, 42 West 44th Street, New York 36, N. Y., before May 1, 1952. Otherwise the entire surplus will be distributed one-half to The Legal Aid Society in New York City and one-half to the National Legal Aid Association.
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> JULIUS APPLEBAUM
> JOHN F. BROSNAN
> ARTHUR VD. CHAMBERLAIN
> CHARLES K. FINCH
> RALPH W. MORHARD
> GEORGE J. SCHNEIDER
> WHITNEY NORTH SEYMOUR
> HARRISON TWEED

The Calendar of the Association
March and April

(As of February 26, 1952)

March 3 Dinner Meeting of Committee on Atomic Energy
Dinner Meeting of Committee on Federal Legislation
"For Bench and Bar" radio program, WNYC-FM (93.9 megacycles), 8:30 P.M., "Significant Changes in Separation Agreements"

March 4 Meeting of Committee on State Legislation
Meeting of Subcommittee of Committee on Municipal Court
"On Trial"—Television Program, WJZ-TV (Channel 7), 9:30 P.M.

March 5 Dinner Meeting of Executive Committee
Meeting of Section on Wills, Trusts and Estates

March 6 Dinner Meeting of Committee on Broadcasting
Meeting of Committee on City Court of the City of New York
Dinner Meeting of Committee on Criminal Courts, Law and Procedure
Dinner Meeting of Committee on Labor and Social Security Legislation
Meeting of Section on Taxation

March 10 Dinner Meeting of Committee on Professional Ethics
Meeting of Section on Jurisprudence and Comparative Law
"For Bench and Bar" radio program, WNYC-FM (93.9 megacycles), 8:30 P.M., "Income Tax Consideration in the Preparation of Wills"

March 11 *Stated Meeting of the Association, 8:00 P.M. Buffet Supper, 6:15 P.M.*
Meeting of Committee on International Law
Meeting of Committee on State Legislation
"On Trial"—Television Program, WJZ-TV (Channel 7), 9:30 P.M.

March 12 Dinner Meeting of Committee on Insurance Law
Dinner Meeting of Committee on the Surrogates' Courts

March 13 *"The Court and Counsel"* Speaker: Theodore Kiendl, Esq., 8:00 P.M. *Buffet Supper,* 6:15 P.M.
Meeting of Committee on Criminal Courts, Law and Procedure

March 17 Meeting of Section on Drafting of Legal Instruments
Dinner Meeting of Committee on Law Reform
Meeting of Library Committee
"For Bench and Bar" radio program, WNYC-FM (93.9 megacycles). 8:30 P.M., "Some Problems in Drafting a Labor Contract

March 18 *Opening of Photographic Show, 4:30 P.M.*
Meeting of Committee on State Legislation
"On Trial"—Television Program, WJZ-TV (Channel 7), 9:30 P.M.

March 19 Meeting of Committee on Admissions
Dinner Meeting of Committee on Courts of Superior Jurisdiction
Dinner Meeting of Committee on Foreign Law
Meeting of Section on Labor Law
Meeting of Committee on Patents

March 20 Meeting of Committee on Criminal Courts, Law and Procedure

March 24 Dinner Meeting of Committee on Municipal Affairs
"For Bench and Bar" radio program, WNYC-FM (93.9 megacycles), 8:30 P.M., "Discussion of the Book *Fifty Years in Labor Relations* by Walter Gordon Merritt"

March 25 Meeting of Section on Litigation
Meeting of Committee on State Legislation
"On Trial"—Television Program, WJZ-TV (Channel 7), 9:30 P.M.

March 26 Meeting of Section on Corporations
Round Table Conference, 8:15 P.M. *Guest—Honorable Harold A. Stevens, Judge of the Court of General Sessions, County of New York*

March 27 Meeting of Committee on Domestic Relations Court
Dinner Meeting of Committee on Trade Regulation and Trade-Marks
Meeting of Section on Trade Regulation

March 31 Meeting of Section on Federal Administrative Controls
"For Bench and Bar" radio program, WNYC-FM (93.9 megacycles), 8:30 P.M., "Wearing Apparel Regulation under O.P.S. (CPR 45)"

April 1 Dinner Meeting of Committee on Legal Aid
Meeting of Committee on State Legislation
"On Trial"—Television Program, WJZ-TV (Channel 7), 9:30 P.M.

April 2 Dinner Meeting of Executive Committee
Meeting of Section on Wills, Trusts and Estates

April 3 Meeting of Section on Taxation

April 7 Dinner Meeting of Committee on Federal Legislation
"For Bench and Bar" radio program, WNYC-FM (93.9 megacycles), 8:30 P.M., "Recent Developments in the Reorganization Provisions of the Code"—George E. Stinson

April 8 Dinner Meeting of Committee on Medical Jurisprudence
Meeting of Committee on State Legislation
"On Trial"—Television Program, WJZ-TV (Channel 7), 9:30 P.M.

April 14 Meeting of Section on Drafting of Legal Instruments
Dinner Meeting of Committee on Municipal Affairs
Dinner Meeting of Committee on Professional Ethics
"For Bench and Bar" radio program, WNYC-FM (93.9 megacycles), 8:30 P.M., "Section on Drafting of Legal Instruments"

April 15 Meeting of Committee on State Legislation
"On Trial"—Television Program, WJZ-TV (Channel 7), 9:30 P.M.

April 16 Forum of Committee on Foreign Law
Meeting of Committee on Admissions
Dinner Meeting of Committee on Insurance Law

April 21 Dinner Meeting of Committee on Courts of Superior Jurisdiction
Meeting of Library Committee
"For Bench and Bar" radio program, WNYC-FM (93.9 megacycles), 8:30 P.M., "Section on Labor Law"

April 22 "On Trial"—Television Program, WJZ-TV (Channel 7), 9:30 P.M.

April 23 *Seventh Annual Association Night*

April 24 *Seventh Annual Association Night*

April 25 *Seventh Annual Association Night*

April 28 Meeting of Committee on Domestic Relations Court
Meeting of Section on Federal Administrative Controls

April 29 *Eleventh Annual Benjamin N. Cardozo Lecture.* "A Trial Judge's Freedom and Responsibility." Speaker: The Honorable Charles E. Wyzanski, Jr., United States District Judge, District of Massachusetts. 8:00 P.M. *Buffet Supper,* 6:15 P.M.
Meeting of Committee on International Law
"On Trial"—Television Program, WJZ-TV (Channel 7), 9:30 P.M.

April 30 Meeting of Section on Corporations

The President's Letter

To the Members of the Association:

As the end of my term approaches, I realize that I have neglected this device for communicating with the small group which curls up for a quiet evening with THE RECORD. Its immunity is at an end.

Everyone knows that the Association at this season is bursting with energy and activity. The committees dealing with legislation are sweating hard over masses of bills. They do a terrific and disinterested job in trying to help minimize legislative mistakes. Other committees are pushing affirmative proposals. These run all the way from minor non-controversial reforms to proposals for a commission to study the need for reform in family law. Sooner or later such a study must come but the resistance to it is stubborn and resourceful. Many committees are engaged in discussing their problems with groups deeply concerned outside of the Association. Thus Military Justice has just had a fine evening with all the new Judges of the Court of Military Appeals who came from Washington to participate in a frank talk about its important new work. And Bill of Rights, favoring greater protection of defendants from improper publicity over jury trials, had a provocative evening's exchange with representatives of all our great newspapers, inaugurating what may be regular meetings between Bar and press. On levity's side, the Entertainment Committee pulled a very large and comical rabbit out of its hat at a Twelfth Night party for the sound purpose of feting H. Tweed, Esq. A fine variety night, fermenting with both amateur and most professional talent. Among the latter, a militant, not to say sadistic, ventriloquist, using Tweed, Ten Eyck, Coleman (J.) and Seymour, as dummies, made fools of his assistants about as fully as could be done in the short time at his disposal. Which was pleasant for everyone else. The Committee is, as usual, winding up for a big pitch in the spring.

In the midst of such activities and antics, the news of Judge Patterson's sad death, at his professional peak, fell as a particularly brutal and senseless blow. The Stated Meeting in March will be largely a memorial to him. The principal remarks will be made by Judge Learned Hand. In addition, the first award of the new Association Medal, to be given from time to time to a New York lawyer who has made "exceptional contributions to the honor and standing of the Bar in this community," will be made posthumously to Judge Patterson.

We are about to amplify the facilities of our committees dealing with the various courts, for observing their practical operation and personnel. These committees are: Judiciary, City, Municipal, Criminal and Domestic Relations Courts. Their normal membership has so many duties that insufficient time is left for extensive observation and visitation. When the qualifications of particular candidates for election or appointment must be scrutinized no precise and comprehensive information as to day-to-day performance over a long period is usually available to supplement that which is gathered when consideration occurs. Volunteers for this purpose in substantial numbers are available among our younger members. Groups will be assigned to each of these committees. Their reports, objectively made and accumulated over a reasonable period, will give the committees fresh and valuable light. This activity will also stimulate the interest and enthusiasm of the large number of younger lawyers who will participate.

Recently the Herald Tribune had some fun with us when it carried a news story about a proposed statute regulating the catching of piscine lawyers. This type of fish was described as being slippery and having a large mouth. Even editorial writers chuckled in a dignified way. We can hardly expect that the profession will ever rise in public esteem much above the position of mothers-in-law, essential to the human family but fair game for its jests.

But we can, I have thought, do a little more to see that indi-

vidual lawyers do not bring disrepute upon the profession. If we could somehow spread the spirit which is within this Association to our fellows outside, we would make a real contribution. The main source of difficulty is that our Bar is so large. Thus, lawyers occasionally feel free to behave in disregard of the spirit of professional fellowship or propriety because they don't expect to meet the same lawyer again. The twin pressures of the spirit of fellowship and the fear of ostracism from its joys are a powerful protection for standards in a small Bar. So, of course, is the intimacy between leaders and juniors a great source of emulation where it flourishes. This is certainly true in smaller American communities and I have been told that it is also true of the small British Bar. We should constantly strive to find devices to overcome the drawbacks to self-discipline which flow from the mere size of our Bar.

Until we find them, the infrequent misconduct of our brethren must be dealt with through the less comradely operation of our grievance machinery. If this is to accomplish all it should, the Bar must encourage, on a broader scale, the presentation to the Grievance Committee of cases of misconduct which poison the public in its view of professional standards. The Committee gets relatively few cases of violations of the canons except of the most egregious sort, of which conversion of clients' funds is most common. Without derogating from the importance of such cases, we all know of others which should have been presented. They are not presented primarily because, after the event, a client is unwilling to reopen and spend time on a concluded matter or the lawyer, who knows the facts, takes that view. Perhaps, also, the lawyer has a natural reluctance to be thought guilty of poor sportsmanship in complaining against a fellow lawyer. But such considerations ought not to prevail. When a clear case of misconduct is thus glossed over, the adverse view of the Bar which members of the public, familiar with the facts, may have formed is perpetuated and perhaps aggravated. The guilty lawyer, free of the criticism and potential ostracism of a small Bar, is em-

boldened to repeat. When such conduct becomes habitual he gets to be a sort of professional derelict who is a menace to the entire profession. Without for a moment giving up its goal of professional fellowship, would not the profession benefit from a somewhat less forgiving attitude?

Nor is the action of the Grievance Committee always akin to the decapitatory verdict of Alice's Queen. Much of its work is prophylactic. Indeed, an admonition by the Committee to an erring brother is close to the friendly guidance of the elders of the smaller Bar, and is usually effective despite the absence of publicity.

WHITNEY NORTH SEYMOUR

February 18, 1952

The Rights and Obligations of Strikers; From the Mackay Case to the Mackay Case: An Instance of Administrative Adaptability

By Helen F. Humphrey

The changing concept of the rights and obligations of strikers displayed by the interpretation of the federal statute defining those rights by the National Labor Relations Board and the courts presents an example of the adaptation of the administrative processes to a changing social and economic environment.

This discussion of the rights and obligations of strikers will be confined to their right to be free from discharge or other discrimination by their employer because they engaged in strike activity and to the obligations incumbent upon them to secure that right. Their collective right to be free from injunctive interference with their strikes will not be included in this discussion.

Prior to the passage of the Wagner Act[1] in 1935, it can be said that strikers had no right to be free from discharge or other discrimination by their employers because they engaged in a strike. The common law of master and servant provided no such protection. It may have been that in some instances employers had agreed in contracts to grant such protection. I have not even been able to find any instance of that.

The Wagner Act in 1935 assured to employees who came under its coverage "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities

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Editor's Note: Helen F. Humphrey, Chairman, National Enforcement Commission, Wage Stabilization Board, delivered this lecture before the Section on Labor Law, Robert A. Levitt, Chairman. The lecture reflects the opinion of the author and not that of any government agency with which she has been or is presently connected.

for the purpose of collective bargaining or other mutual aid or protection" (Section 7).

This Act also made it an unfair labor practice on the part of an employer "by discrimination in regard to hire or tenure of employment, or any term or condition of employment to encourage or discourage membership in any labor organization" (Section 8 (3)), and provided that the Board might, upon finding that an employer had committed an unfair labor practice, "take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act" (Section 10 (c)). The Act also expressly preserved the right to strike (Section 13).

Shortly after the passage of the Wagner Act, the National Labor Relations Board was faced with situations in which an employer had, at the termination of a strike, refused to reinstate or otherwise discriminated against employees who had engaged in the strike. The Board concluded that the employers' refusal to reinstate strikers because they had engaged in strike activity was an unfair labor practice under Section 8 (3) of the Act, as well as an interference with the rights of employees to self-organization, etc., guaranteed by Section 7, and thus a violation of Section 8 (1) as well. It adopted the remedy of requiring employers to afford strikers, upon their unconditional application at the conclusion of the strike, reinstatement to their former or substantially equivalent positions, and to make them whole with back pay, from the time of their application to the time when they were offered reinstatement. The Board distinguished between the treatment of employees who had gone out on strike for purely economic reasons and strikers who had engaged in strike activity caused or prolonged by the unfair labor practices of their employer.

The difference in the remedy granted unfair labor practice strikers, as opposed to strikers who had gone out solely for economic reasons, was this: the employer might replace economic strikers by other employees and, if he did so, need not thereafter reinstate the strikers whose jobs had been filled. On the other

hand, regardless of whether a striker had not had his job filled before he returned from a strike caused or prolonged by the unfair labor practices of his employer, he was entitled to reinstatement to his job, even if this required the displacement of an employee hired to replace him. The Supreme Court sustained this policy in *N.L.R.B.* v. *Mackay Radio and Telegraph Company*, 304 U.S. 333, enforcing 1 N.L.R.B. 201.

Thus, in the beginning the Board granted the remedies available under the Act to all strikers and did not consider, with the single exception noted of whether the employer's unfair labor practices had contributed to the strike, what the objective of the strike was.

Early in the history of the Wagner Act, the Board was confronted by defenses urged by employers to the effect that the striking employees had engaged in conduct which removed them from the protection of the Act. These contentions were of two kinds: (1) That the strikers had engaged in tortious or criminal *conduct* during the course of the strike, and (2) that the strikers should be denied the rights which the Board customarily granted them because of the *object* for which they struck.

The theory on which these contentions was based was somewhat confused. This was partially because at that stage of the game there had been little judicial determination on the scope of the definition of "employee" under the Act. Accordingly, it was frequently contended that an employee should not be granted reinstatement because he had ceased to be an employee within the meaning of the Act, and hence could not come within the scope of the remedy provided. On the other hand, it was contended that, regardless of whether the individual remained an employee within the meaning of the Act, the Board should not order his reinstatement, because it would not effectuate the policies of the Act to do so. In my opinion, the Supreme Court itself has added to this confusion by some of the language in the *N.L.R.B.* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240, *Southern Steamship* v. *N.L.R.B.*, 316 U.S. 312, and *N.L.R.B.* v. *Sands*

Manufacturing Co., 306 U.S. 332, cases, some of the leading early cases interpreting the obligations of strikers.[2] My own opinion is that it would be more accurate to consider these problems from the viewpoint of whether it would effectuate the policies of the Act to reinstate such strikers, regardless of whether they continued to be employees up to the time of the action by the employer, the justification for which is in issue.

As I have stated, the attitude of the Board originally was that, regardless of their conduct or of the objective of the strike, strikers should be permitted the full remedy available under the Act. To understand why it reached this conclusion one must examine the atmosphere in which the Wagner Act was passed.

Congress had determined that the widespread industrial unrest which then prevailed was attributable in part to the fact that employers were at liberty to take any action they chose to prevent their employees from forming, joining, or assisting unions of their choosing. Whenever organizational efforts were initiated by unions and strikes were called, the State courts and, prior to the passage of the Norris-LaGuardia Act, the Federal courts had frequently, upon allegations of relatively minor damage, issued injunctions which prevented employees from engaging in collective activity. It was in this atmosphere, and to assist in removing these causes of industrial unrest and turmoil, that the Wagner Act was passed. One prevalent practice against which unions had been protesting, which had led to the widespread granting of injunctions, was a determination by the courts as to the propriety of the object of the strike. The Board, under these circumstances, felt that if the conduct of the strikers was in violation of the law, appropriate law enforcement agencies should remedy it. If the strike was in violation of a contract, the employer, at least in theory, had his remedy in contract. The Board felt that to permit an employer to resort to "self-help" would result in prolonging the very evils which Congress had sought to eliminate by the legislation passed during the thirties.

In regard to the class of cases in which it was contended that

individuals should not be reinstated because they or their fellows had engaged in conduct on the picket line which could constitute a tort or violate a criminal statute, the Board was persuaded at an early stage to apply a doctrine which limited the misconduct in which an employee could engage and still retain for himself the protection of the Act. *Harnischfeger Corporation,* 9 N.L.R.B. 676, 689. However, it concluded that minor violence on the picket line, where the conduct of the tea table was not apt to prevail, was not justification for the employer himself determining that the striker, or his fellows, could not be reinstated. Such conduct, the Board felt, should be punished by the proper law enforcement authorities. This doctrine was approved by the Court in the *Republic Steel* case[3] and has continued in effect down to the present time. In recent years, the Board, as a matter of policy, has refused to reinstate employees who have been convicted by courts of improper conduct during the course of the strike, but has not applied this doctrine to cases where there have merely been arrests or even indictments which did not lead to convictions. *Porto Rico Container Corporation,* 89 N.L.R.B. 1570, 1576, 1624. But the Board maintains that it need not accept the court's disposition of such claimed misconduct as binding on it, and requires the employer to show affirmatively that the employee actually performed the misdeeds complained of.[4]

The first severe impact on the Board policy of requiring reinstatement of strikers, regardless of the nature of the strike, was encountered in the famous *Fansteel* case. In that case, during the round of sit-down strikes in 1937, Fansteel's employees had engaged in a strike wherein they not only refused to perform their duties, but also refused to leave the plant and forcibly resisted eviction. This situation, while bordering on those cases where it is the objective of the strike which is advanced as a ground for denying reinstatement to strikers, really falls into the class of cases in which it is the means of the strike or the conduct of the strikers which is attacked. In that case, the Supreme Court held that by engaging collectively in conduct which was unques-

tionably illegal, the strikers had, in fact, removed themselves from the Act's protection. It limited its decision, however, to the facts of that case which did not constitute any clear precedent for the general problem of what rights remain to strikers where their conduct was alleged to be illegal for some other reason. But this case did lead the way for the decision of the Supreme Court in the case of *U.A.W.* v. *Wisconsin Employment Relations Board,* 336 U.S. 245. The issue there was primarily whether the Federal Government had protected conduct found to be illegal by the Wisconsin Board, where a union had engaged in a series of intermittent and unannounced "quickie" work stoppages at the employer's plant. The Supreme Court found that the State's action in forbidding this conduct was not in conflict with the Federal policy of protecting the right to strike, since in the *Fansteel* and other cases to which we shall refer, the right of the Board to order reinstatement of such strikers had been limited.

More recently the Board itself has held that an employer was justified in discharging employees who, in order to induce their employer to increase their hourly rate of pay or to return to a prior piece work rate, engaged in a slow-down by decreasing their production to the amount they considered adequate for the pay they were receiving, saying "Either an unlawful objective or the adoption or improper means of achieving it may deprive employees engaged in concerted activities of the protection of the Act." *Elk Lumber Company,* 91 N.L.R.B. 333, 337. See also *International Shoe Co.,* 93 N.L.R.B. No. 159.

In applying its policy in regard to the purported misconduct of strikers, the Board has shown a growing tendency to impose stricter obligations on strikers than it is required to under the *Republic Steel* decision. Thus, it has found the use of profane and abusive terms by strikers to justify their discharge (*Midland Broadcasting Co.,* 93 N.L.R.B. No. 65), and has even refused to reinstate employees who publicly criticized their employers' television station as rendering "second-hand service" to the public (*Jefferson Standard Broadcasting Co.,* 94 N.L.R.B. No. 227).*

This imposition of stricter standards upon the conduct of strikers has evolved not through a change in the applicable principle, but by a tighter policy in resolving factual issues. The Board has tended more frequently of late to conclude that an employer who refused to reinstate a striker *really* acted because of the employee's misconduct, and not because of his having engaged in strike activity. Thus, in regard to justifying discrimination because of the means, as opposed to the object, of strikes, the principle has remained the same but has been, of late, applied more leniently from the employer's viewpoint, to factual situations.[8]

We shall see this adaptation of the Board's policies to a changing economic atmosphere more sharply revealed when we consider the evolution of its policies as to the effect of the objective of the strike on the rights of strikers.

While policy evolved slowly and the Board's general principles have been maintained without substantial interference by the courts in regard to the *conduct* of strikes, the original policy which I have described in regard to the consideration to be given to the objective of the strike has changed considerably from that originally set forth in earlier cases.

Apart from instances in which individual strikers had engaged in tortious or criminal conduct during a strike, employers sought to prevent strikers from procuring reinstatement in cases where the strikes themselves were alleged to be "illegal." This illegality stemmed from (1) the fact that the strikes were in violation of contracts into which the union had entered, or (2) the fact that the strikes in themselves constituted a violation of some other statute or sought to compel some illegal act.

The Board originally took the position, in compliance with the theory which I have already described, that the employer should have a collateral remedy for such conduct, but that it should not remove the strikers from the protection of the Act. However, the Supreme Court took a different view. In the *Sands* case (*N.L.R.B.* v. *Sands Mfg. Co.*, 306 U.S. 332) it held that where

a union had agreed with an employer that it would not go out on strike, those who participated in a strike in violation of their union's contractual obligation had removed themselves from the protection of the Act.

Subsequently, the Supreme Court (*Southern Steamship Co.* v. *N.L.R.B.*, 316 U.S. 31) upheld the right of an employer to refuse to reinstate strikers who had engaged in a sit-down strike on a ship moored in a safe harbor, since technically their conduct constituted a violation of the statute forbidding mutiny. In this case the Court admonished the Board that it might not decide the rights of strikers by regarding the provisions of the National Labor Relations Act in a vacuum. The purposes of that Act, said the Court, must give way to the Federal statutory scheme as a whole, and conduct which might be violative of the National Labor Relations Act could not be remedied in such a fashion as to disregard the requirements of other Federal statutes.

Under the guidance of courts, then, the Board modified its original position and denied reinstatement to strikers where their strike was in violation of a union contract or in furtherance of an act forbidden by the law. However, it construed strictly the limitations placed upon the rights of strikers under these cases and continued to assert the theory that, aside from the precise circumstances in which the Court had forbidden it to do so, it must not permit employers to engage in self-help and penalize strikers who had committed any conduct short of the conduct defined by the courts as removing them from the protection of the Act.

This strict construction of the limitations placed by the Supreme Court on the rights of strikers was not viewed favorably by the circuit courts, and there occurred during the early forties what might be regarded as the revolt of what were then known as the United States Circuit Courts of Appeals.

For instance, the Fourth Circuit in the *Draper Corporation* case[7] held that strikers were denied the protection of the Act when they engaged in what that court found to be a "wildcat"

strike, where a minority union sought to usurp the functions of the representative of a majority of the workers. The Eighth Circuit in the *Montgomery Ward* case[8] came to a similar conclusion where employees refused to process work for another plant where a strike was in progress. Similarly, the courts found that the Board had improperly held within the protection of the Act strikers who had picketed in such a fashion as to prevent their employer and his agents from exercising their right of ingress and egress (see *Perfect Circle*[9] and *Indiana Desk*[10] cases).

None of these cases was appealed to the Supreme Court by the National Labor Relations Board, and the Board continued to hand down decisions which might be regarded as at variance with these holdings of the circuits. However, it is interesting to note that as time went on the Board gradually came to accept the point of view expressed by these circuits. Thus, in one case (*Scullin Steel,* 65 N.L.R.B. 1294), it found that strikers were deprived of the protection of the Act even where the union which had entered into a no-strike contract with the employer was found by the Board to have been assisted by the employer.

This tendency to abandon its strict construction of the cases limiting the right of strikers was displayed during World War II in *The American News Company, Inc.,* case (55 N.L.R.B. 1302). Here, the Board was presented with a situation where a union had gone on strike to compel an employer to grant a wage raise without approval by the War Labor Board. The National Labor Relations Board, extending the doctrine of the Supreme Court expressed in the *Southern Steamship* case, held that strikers who went out to compel their employer to grant a wage raise in violation of a regulation of the War Labor Board, were not protected by the Act, particularly since the Price Control Act directed agencies to support the stabilization program. Thus, even prior to the Taft-Hartley amendments, the Board itself, in the light of a changing economic situation, gradually withdrew from strikers the unqualified right to reinstatement which it had originally afforded them.[11]

Nevertheless, it continued to show reluctance to permit an employer to discriminate against strikers because the strike had an illegal object, such as to compel an employer to recognize a union where such recognition would have been illegal. *Columbia Pictures Corporation,* 64 N.L.R.B. 490; cf. *Thompson Products,* 70 N.L.R.B. 13, 72 N.L.R.B. 886.

One of the recent developments in the field of strikes whose objective is alleged to be illegal is that involving employers who have customarily bargained and contracted with unions on an association-wide basis.

It is strange that these situations have not previously arisen throughout the years, because in many industries, such as the printing industry, it has been the practice over a long period for employers to deal with unions, not as individuals, but in concert with other members of an employer association.

Unions have recently employed the device of striking one member of an employer association, when an impasse has been reached in bargaining relations. This situation has been presented to the Board repeatedly in the last 2 years. Typically, it arises under these circumstances: A union has, after negotiations have broken down, called a strike against one employer who is a member of the employer association with which the union has been bargaining. Other members of the association have thereupon locked out their employees. These employers contend that they could properly lock out their employees under these circumstances. They have sought to justify this on the following grounds: (1) The conduct of the union in striking one employer constitutes illegal conduct in that, by striking one member of an employer association, the union has, in effect, coerced an employer in the selection of his bargaining representative, in violation of Section 8(b)(1)(B) of the Taft-Hartley Act, and refused to bargain with an employer within the meaning of Section 8(b)(3) of the Act; (2) this is a device on the part of a union which can serve to undermine association-wide bargaining, and, hence,

the strike is illegal; and (3) an employer has the right to lock out his employees to gain his ends in an economic strike, and this is not discrimination within the meaning of Section 8(a)(3).

The issues in these cases are sometimes complicated by an additional contention that other members of the association were obliged to lock out their employees who struck one member in order to prevent spoilage, since the other employers were uncertain when the strike might be directed against them.

In the *Morand Brothers Beverage Co., et al.*, 91 N.L.R.B. No. 58, rev'd 195 F. 2d 576 (C.A. 7), case,[12] the Board found, as a matter of fact, that the employers there involved had discriminated against the employees of the plants of both the struck employer and those which had not been struck, when they locked them out and discharged them. The Board reasoned that the conduct of the employees was not a violation of Section 8 (b) (3) or 8 (b) (1) (A), and that the employer was not justified in locking out even the nonstriking employees. The Board, in this case, distinguished between the action of the employer in permanently discharging the employees at the non-striking shops, and a mere lay-off.

The Court of Appeals for the Seventh Circuit reversed the Board's decision. The Board, nevertheless, has continued to enunciate this doctrine, and found a violation by an employer-member of the association even in laying off employees whose union had struck one of their members in the *Davis Furniture Co.*, 94 N.L.R.B. No. 52, case. Subsequently, in a case involving the *Betts-Cadillac Olds, Inc.*, 96 N.L.R.B. No. 46, the Board found that employers had not engaged in discriminatory conduct by a shut-down by a group of employer-members of an association under what appeared, on the surface, to be similar circumstances. This case, however, does not, in my opinion, constitute a departure from the policy of the *Morand* or *Davis Furniture* decisions, but rests on a factual determination that the employers, in the *Betts* case, were not discriminating against the

employees because of protected concerted activity, but merely had shut down as an economic measure, where they could get no assurance of adequate notice before a strike.

This is a very serious problem, because it is undoubtedly true that to permit unions to strike one member of an employer association and to permit their competitor, fellow members of the association, to benefit by this strike, constitutes an extremely forceful economic weapon. On the other hand, it may be that it is inaccurate to quote glibly the language we have been so prone to use in Wagner Act cases, to the effect that an employer has his economic right to lock out, just as employees have their economic right to strike. In almost every instance where an employer locks out his employees, and that conduct is used as a means of imposing his will upon their negotiating position, that lock-out may be discrimination to discourage activities in a union. This kind of lock-out was, of course, forbidden by the Wagner Act under the provisions which were retained by the Taft-Hartley amendments. On a decisional level, it is very difficult to balance the equities in these cases, and I think they will have to be decided on a factual basis rather than by the application of broad principles. Probably the situations in which the Board and the courts, if the doctrine is sustained, will protect employees from lock-out where they have struck one member of an association, will be those in which it is concluded that the lock-out was not for necessary economic reasons but rather to penalize the employees for their collective action. Attorneys on both sides will watch with interest the development of these cases.

With the passage of the Taft-Hartley Act,[18] additional limitations were placed upon the rights of strikers to be free from discrimination by their employers. This Act, it will be recalled, defined certain conduct as constituting unfair labor practices by unions, instead of defining merely that of employers. The question immediately was presented as to whether employees who engage in a strike which itself constituted conduct proscribed as an unfair labor practice on the part of their union by the

Taft-Hartley Act were removed from the protection of the provisions against discrimination which remained a part of the amended Act.

One provision of the amended Act (Section 8 (d)) which might affect the rights of strikers was that whereby the statute expressly removed from the protection of the Act employees of a union which engaged in a strike without taking certain prior action, and thereby committed an unfair labor practice in violation of Section 8(b)(3). This section required (1) sending a notice to the employer and to State and Federal mediation and conciliation agencies and (2) continuing the contract in effect without strike for a 60-day period thereafter.[24]

This imposed a clear limitation on the rights which strikers had been guaranteed under the Wagner Act. The question immediately arose as to whether strikers who went out prior to the expiration of the 60-day period would be denied the protection of the Act even though the strike was caused by the unfair labor practices of their employer. This question has not, as far as I know, been resolved.

In addition to the effect upon the rights of strikers of these express provisions of the Taft-Hartley amendments, many questions arose out of the Act as a whole. It was apparent that the passage of the Taft-Hartley amendments reflected a changed atmosphere, both economically and politically. Congress now was concerned not only with protecting the rights of employees to bargain collectively and engage in concerted activity. It also was concerned with the rights of individual employees, employers, and the public as a whole to be protected against certain conduct on the part of trade unions. The whole atmosphere surrounding the passage of the Taft-Hartley Act made it apparent that Congress felt that, having enjoyed the protection and encouragement afforded them by the Wagner Act, trade unions should have reached a state of maturity and responsibility and, accordingly, be required to meet certain obligations. How would this affect Board policy?

The National Labor Relations Board has of late displayed the more rigid standards which it now imposes on strikers. A recent case serves to round out the whole history of the changing concepts of the rights and obligations of strikers. It is an interesting coincidence that this case, like the case which originally set forth the Wagner Act policy on the rights of strikers, involved the Mackay Radio and Telegraph Company.

The recent *Mackay* case (96 N.L.R.B. No. 106) involved a strike of employees who had been represented by the American Communications Association, a union which had not qualified with the filing requirements of Sections 9 (f), (g) and (h) of the Taft-Hartley Act. The Board found that, in the course of the negotiations which led to and continued during the strike in question, that union had adamantly insisted that the employers there involved agree to a union security contract which would have been unlawful at the very least without an election conducted pursuant to Section 9 (e) of the Act, a condition precedent at that time to the limited union security provision which the Taft-Hartley Act permitted.

The Board there reached the conclusion that a strike to compel an employer to violate what it termed "a clear Congressional mandate," as expressed in Section 8 (a) (3) of the Act, was a strike which, if the union had been a respondent, the Board would have found to be a strike in violation of Section 8 (b) (2) of the Act. This section declared it to be an unfair labor practice for a union to cause or attempt to cause an employer to discriminate against an employee in violation of Section 8 (a) (3) of the Act. This is the same section, it will be remembered, from which stemmed the right of strikers to be protected against discharge for striking. But, under the Taft-Hartley amendments, the employer's obligation not to discriminate against employees for union activity was more strictly limited. The employer, under that section, as amended, might not discriminate against an employee pursuant to a closed-shop contract with the union, as he had been permitted to do under the Wagner Act. In fact, the

only type of union security contract on which an employer might rely as a defense to charges of discrimination against an employee was the limited type of union security provision described in that section of the Act. Even such a contractual provision might not be used by the employer as a defense unless the contracting union had (1) complied with the filing requirements of the Taft-Hartley Act, and (2) been successful in an election conducted by the Board in which the employees voted to authorize it to enter into such contract.

In the recent *Mackay* case, as I have said, the union had not even complied with the filing requirements. The Board in this case answered the principal question which I posed as having arisen after the passage of the Taft-Hartley amendments. It held that employees who engaged in conduct which itself constituted an unfair labor practice on the part of their union were not any longer protected against discharge by their employer.

This was a substantial departure from the policy of the Board under the Wagner Act. Then the Board had held that, even where employees were striking to compel an employer to discriminate against an employee in violation of that Act, the strikers were still protected.[15] Even after the passage of the amendments, the Board had rejected contentions that discrimination by an employer was excused because the employees had engaged in conduct which would have been illegal on the part of the union.[16] Now, however, where the statute defined such conduct as an unfair labor practice by a union, the Board found the strikers unprotected.

I am of the opinion that as a matter of law the Board was not forced to this conclusion. I think, although the matter is not entirely free from doubt, that despite the *Southern Steamship* case, since Congress had expressly set forth a remedy against the union for this type of conduct, the Board could still, as a matter of law, have found the employees who engaged in the strike protected by Section 8(a)(3). The old arguments against "self-help" would have been more persuasive now that the employer's

remedy against the union was set forth in the Act. However, I believe that as a matter of policy the Board, in the exercise of its discretion, was probably capitulating to and following the demands of public interest and congressional intent which the current economic and political atmosphere reflected. I think it is interesting and noteworthy that an administrative agency can adapt itself to a changing atmosphere and changing conditions so as to reflect the expertness which justifies the delegation to administrative tribunals of judicial functions in special areas.

During the 12-year period between the action of the Supreme Court in the original *Mackay* case under which it set forth the rules by which employers would have to abide, in reinstating employees who went out on strike, and the recent *Mackay* case, in which the Board determined to deny those rights to strikers, where their strike constituted conduct which violated what Congress had defined to be an unfair labor practice by their union, the wheel of Federal labor relations policy, in regard to the right of strikers, has made an almost complete turn. It is to be hoped that all the agencies which have the obligation of carrying out our Government's labor relations policy may succeed in attaining a proper balance between (1) effectuating the intent of Congress and (2) adapting their policies, in the wide area given to their discretion, to the realities of the social and economic atmosphere in which we function. It is indeed a difficult balance to attain.

During the first few years after the passage of the Wagner Act the Board was not confronted by problems of what constituted a strike or concerted activity within the meaning of the Act. At that time the struggle was between employers and unions. If employees were discriminated against because they engaged in concerted activity which was not union activity, these matters were not brought to the Board's attention by the unorganized individuals who suffered from such discrimination.

As Board policy concerning the rights of strikers who engaged

in strikes or concerted activity which was undistinguishable from union activity developed, however, there were brought to the Board's attention a number of situations in which the question was posed as to whether the conduct of a number of individuals constituted "concerted activity" or a "strike" within the meaning of the Act. These cases arose where a number of employees had jointly presented a grievance to their employer or had jointly quit work in protest over some conduct on the part of their employer. Since the language of Section 8 (3) was limited to discrimination to encourage or discourage membership in a labor organization, the question was presented as to whether such mutual activity had that effect. As a practical matter, whether discrimination against collective action constituted a violation of Section 8 (3) was not particularly important, since it was quite clear that the broad language of Section 8 (1), protecting the rights secured to employees by Section 7, covered such activities. Therefore, whether the Board found concerted activity which was not immediately identifiable with union activity to be discrimination in violation of Section 8 (3), or merely interference, restraint, or coercion with the right to engage in concerted activity for the purpose of collective bargaining or mutual aid or protection, was not particularly significant. In any event, the Board could order their reinstatement.

Strangely enough, a very interesting aspect of this problem had not been clearly presented to the Board until recent years. This involved the right of an individual employee to refuse to cross a picket line and still be protected from discharge by his employer. In two situations which occurred locally this issue was recently presented to the Board. In one case (*Cyril de Cordova & Bro.*, 91 N.L.R.B. 1121) an employee who worked for a broker specialist had included among his duties the obligation to make trips to the floor of the stock exchange. While the employees of the exchange were engaged in a strike a couple of years ago, this employee of the broker, although the employees of his employer were not out on strike, refused to cross the picket line at the stock exchange

and thus refused to perform part of his duties. The Board held that by this conduct he was assisting a labor organization and by respecting the picket line against another employer he was engaging in activity which was protected both by Section 8 (a) (1) and 8 (a) (3) of the amended Act.

Again, during the recent strike of the International Typographical Union at the Nassau Daily Review Star in Rockville Center, an employee of the Rockaway News Company refused to cross the picket line to pick up copies of that newspaper and was discharged by his employer.[37] The Board found that even though his union, the Newspaper and Mail Deliverers' Union, an unaffiliated organization, was not supporting the strike, he was engaging in protected activity in concert with the striking ITU employees and that his employer could not discharge him for such conduct.

Recently, to the great surprise of Government attorneys, the Supreme Court has raised serious doubt as to whether it will indorse the Board's conclusions in cases like these.[38] The Supreme Court refused to review a decision of the Seventh Circuit wherein that Court had refused to enforce a Board order directing the reinstatement of eight telephone supervisors employed by the Illinois Bell Telephone Company. These employees refused to cross a picket line maintained by a union of non-supervisory employees. The supervisory status of these individuals was immaterial to the determination of the circuit court, since this conduct occurred prior to the passage of the Taft-Hartley amendments.

If the denial of certiorari by the Supreme Court means that employees who are not engaging in a strike against their own employer may be discharged by their employer for refusing to cross a picket line maintained by other employees, this could constitute more serious inroads than have yet been made on the rights guaranteed employees under the Wagner Act. Probably the most effective economic weapon which workers have is that of appealing to employees of other employers to respect their picket line. If employers are free to discharge at will employees who, without

going on strike themselves, respect the picket line maintained by other employees, the result might be that more widespread strikes would be encouraged.

It will be a matter of great interest, both to representatives of unions and of employers, to see what the results of this case are. I think it must be regarded as a question which is still open.

NOTES

[1] 49 Stat. 449 (29 U.S.C., Secs. 151, *et seq.*).

[2] Citations throughout this paper are suggestive rather than exhaustive.

[3] *Republic Steel Corp.* v. *N.L.R.B.*, 107 F. 2d, 472 (C.A. 3), modified in other respects, 311 U.S. 7.

[4] *Nashville Corp.*, 94 N.L.R.B. No. 233; *Standard Oil of Calif.*, 91 N.L.R.B. 783, 786–791; *Ohio Associated Telephone Co.*, 91 N.L.R.B. 932, 934 rev'd, 192 F. (2d) 664 (C.A. 6), 29 LRRM 2155; *Mid-Continent Petroleum Corp.*, 54 N.L.R.B. 912.

[5] For an earlier case in which the Board strictly construed the misconduct of strikers' conduct, see *Socony-Vacuum Oil Company, Inc.*, 78 N.L.R.B. 1185, 1186.

[6] It is elementary that a discharge or refusal to reinstate is not violative of the Act if it neither constitutes "discrimination" within the meaning of Section 8(a)(3) or "interference, restraint or coercion" within the meaning of Section 8 (a)(1). Congress reflected the Board's practice when it expressly provided in the Taft-Hartley amendments that employees discharged "for cause" were not entitled to reinstatement (Section 10 (c)).

[7] *N.L.R.B.* v. *Draper Corporation*, 145 F. (2d) 199.

[8] *N.L.R.B.* v. *Montgomery Ward & Co.*, 157 F. (2d) 486 (C.A. 8).

[9] *N.L.R.B.* v. *Perfect Circle Company*, 162 F. (2d) 566, 578 (C.A. 7).

[10] *N.L.R.B.* v. *Indiana Desk Co.*, 149 F. (2d) 987, 995 (C.A. 7).

[11] But see *Indiana Desk Co.*, 56 N.L.R.B. 76 and 58 N.L.R.B. 48, rev'd in this respect, 149 F. 2d 987 (C.A. 7).

[12] See "Whipsawing in Multiemployer Bargaining," 3 Stanford Law Review 510 (April, 1951); note 65 Harvard Law Review 353 (December, 1951).

[13] 61 Stat. 136, 29 U.S.C., Supp. III, Secs. 151 *et seq.*

[14] The Act provided that "any employee who engages in a strike within the 60-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of Sections 8, 9 and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer."

[15] *The Hoover Company, Inc.*, 90 N.L.R.B. 1614, 1618, rev'd 28 LRRM 2352; *Electronics Equipment Co., Inc.*, 94 N.L.R.B. No. 19.

[16] *Consolidated Frame Co.*, 91 N.L.R.B. No. 197; *Intertown Corp. (Michigan)*, 90 N.L.R.B. 1145; *Tennessee Coach Company*, 84 N.L.R.B. 703.

[17] *Rockaway News Supply Company, Inc.*, 95 N.L.R.B. No. 50.

[18] *N.L.R.B.* v. *Illinois Bell Telephone Co.*, 342 U.S. 885 (28 LRRM 2079).

Review of Recent Decisions of the United States Supreme Court

By Marvin Schwartz and Edwin M. Zimmerman

BOYCE MOTOR LINES, INC. VS. U. S. A.

(January 28, 1952)

One consequence of the explosion in the Holland Tunnel of a truck loaded with carbon bisulphide was litigation over the validity of an Interstate Commerce Commission regulation which provided that "Drivers of motor vehicles transporting any explosive, inflammable liquid . . . . . shall avoid, so far as practicable, and, where feasible, by prearrangement of routes, driving into or through congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts and dangerous crossings." The penalty for knowing violation of the regulation was fine, imprisonment or both.

The Boyce Motor Company was indicted for knowingly violating the regulation when it sent its truck carrying carbon bisulphide through the Holland Tunnel. The District Court, however, dismissed the indictment which was based on the regulation, holding that the language "so far as practicable, and, where feasible" was too vague to serve as a standard of guilt. The Court of Appeals reversed and the Supreme Court, in a six to three decision, affirmed the Court of Appeals.

Mr. Justice Clark, writing for the Court, found much in the background of the regulation—the careful consideration given to the difficulties involved in framing such a regulation, the consulting with the carriers, the numerous drafts—as well as in the fact that only those who knowingly violated the regulation were punished, to support the regulation against the argument that it was so unfair as to be invalid. Justice Clark refused to take judicial notice of the absence of a practicable way of crossing the Hudson which could have avoided points of danger to a substantially greater extent than the route taken. That, he said, was a matter for proof at the trial, and he affirmed the action of the Court of Appeals in remanding the case to the District Court with directions to reinstate the indictment.

Mr. Justice Black and Mr. Justice Frankfurter joined in a dissent written by Mr. Justice Jackson, who prefaced his opinion with an assertion of the need for "considerable precision" in the exercise of a delegated federal crime-making power. The regulation, he said, envisaged a number of possible routings and the avoidance of routing through congested thoroughfares, tunnels, etc. "so far as is practicable." Taking judicial notice of geography, Justice Jackson pointed out that delivery of the goods was im-

possible except by passing through many congested thoroughfares and through either tunnels, viaducts or bridges. The regulation provided no guidance as to how one could with reasonable certainty choose a route which complied with its requirements. The fact that the violation must be knowing does not serve to mitigate the defects of the regulation, which is so vague that the defendant could not learn from its terms what conduct he had to strive for. The dissenting justices regarded the public interest as best served by the invalidation of this vague regulation, thereby permitting enactment of local regulations specifying intelligible standards of conduct.

CITIES SERVICE COMPANY VS. MC GRATH

(January 28, 1952)

The Trading with the Enemy Act, first enacted in 1917 and expanded during World War II, had two primary objectives: (1) to prevent the enemy from using for his own purposes property which he owns or controls, located within the United States; and (2) to make that property available to the United States for its own utilization. The first purpose was accomplished by "freezing" controls which prohibited and invalidated unlicensed transfers. The second purpose was accomplished by the Alien Property Custodian's "vesting" the property—i.e., transferring the ownership of the property to the United States, there to remain unless the former owner could avail himself of one of the sections of the act providing for return. This term the Court has had occasion to deal with two problems arising under the "vesting" provisions. The instant case concerns what property may be "vested"; *Guessefeldt* v. *McGrath*, discussed below, involves who may recover "vested" property.

The Attorney General of the United States, as successor to the Alien Property Custodian, sued the obligor and the indenture trustee on certain debentures, seeking payment. The obligations had previously been vested pursuant to the Trading with the Enemy Act. The debentures themselves were never in the Attorney General's possession and, so far as is known, were located outside the country at the time of vesting.

The District Court had directed a summary judgment for the obligor and trustee on the theory that the obligations represented by the debentures were inseparable from the certificates, and that the Attorney General had exceeded his authority, which was to vest property "within the United States."

The Court of Appeals for the Second Circuit reversed, holding that the Act allowed seizure of obligations so long as the obligor was within the country, even though the debentures evidencing the obligations were outside the country.

The Supreme Court, Mr. Justice Clark writing, agreed with the Court of Appeals. The language of the Trading with the Enemy Act was held to

demonstrate clearly that Congress intended to give power to seize an interest represented by a bond without seizing the actual instrument. The argument that the "situs" of the debentures was outside the United States was rejected as based on a fiction. The Court, referring to the recent decision in Standard Oil Co. v. New Jersey, 341 U.S. 428, 438, pointed out that so long as the obligor was within the United States the obligation could be dealt with effectively through the exercise of jurisdiction over the obligor, even though the debenture evidencing the obligation be outside the country.

The second question examined by the Court was whether seizure under the Act would take the property of the obligor and trustee in violation of the Fifth Amendment. This question arose because of the possibility that a foreign court might make them liable to a holder in due course of the debentures. Although Justice Clark thought such second payment improbable, he agreed that the petitioners would have the right to recoup from the United States just compensation to the extent of their double liability. The cause of action against the United States would accrue only if and when a foreign court forced the obligor or trustee to pay the holder of the debentures. With this assurance against double liability the present seizure would not itself be an unconstitutional deprivation of property.

Mr. Justice Reed and Mr. Justice Minton concurred in the opinion and result except as to the determination of the right to recoup. They felt that decision on the existence of a cause of action against the United States in the event of double liability should await development of the actual problem.

GUESSEFELDT V. McGRATH

(January 28, 1952)

Section 9 (a) of the Trading with the Enemy Act provides that any person "not an enemy" may recover property belonging to him which has been vested by the Alien Property Custodian. The term "enemy" is defined in Section 2 (a) of the Act to mean a person "resident within the territory • • • of any nation with which the United States is at war." In 1948, Congress enacted a new Section 39, which provides that vested property shall not be returned to "any national" of Germany or Japan.

The Court held in the instant case that a German citizen who had been involuntarily detained in Germany during World War II was neither an "enemy" as that term appears in Section 9 (a), nor a German "national" within the meaning of Section 39.

Guessefeldt, a German citizen, lived continuously in Hawaii from 1896 to 1938. In April, 1938 he took his family to Germany for a vacation. After the outbreak of World War II, he was unable to secure passage home. When the United States entered the war, he was involuntarily detained in Germany, first by the Germans and then by the Russians, until his re-

turn in July, 1949. During Guessefeldt's detention in Germany, "he did nothing directly or indirectly to aid the war effort of the enemy."

Guessefeldt brought suit under Section 9 (a) to recover property which had been vested by the Alien Property Custodian. The District Court for the District of Columbia dismissed Guessefeldt's complaint and the Court of Appeals affirmed, both courts holding that although he was not an "enemy" within the meaning of Sections 2 (a) and 9 (a), he was a German citizen and hence a German "national" whose right to recovery was barred by Section 39.

The Supreme Court, in an opinion by Mr. Justice Frankfurter, agreed with the courts below that there was nothing in Sections 2 (a) and 9 (a) to bar Guessefeldt's suit. Guessefeldt had been detained in Germany against his will, the Court noted, and the term "resident," as used in Section 2 (a) "implies something more than mere physical presence and something less than domicile." Here, there was nothing more than mere physical presence in Germany.

The judgment below was reversed, however, on the ground that there was nothing in Section 39 to bar Guessefeldt's suit. The Court noted that while the question was not free from doubt and while none of the considerations canvassed, standing alone, would be conclusive in Guessefeldt's favor, Section 39 must be construed "harmoniously" with Section 9 (a); the term "national" in the new section has the same meaning as the term "enemy" in Section 9 (a), so that Section 39 precludes the return of vested property only as to those aliens who could not in any event sue under Section 9 (a). Among the considerations canvassed by the Court was the tenor of the legislative history of Section 39, which demonstrated no Congressional purpose to alter the scope of Section 9 (a); the only reason for the absence of a saving proviso in Section 39 was the "unwarranted" Congressional assumption that a national of an enemy nation had no rights under Section 9 (a) in any case. In enacting Section 39, Congress was primarily concerned with preventing a recurrence of the post-World War I program of returning vested assets even to enemy aliens and the problem posed by the instant case was therefore peripheral from the legislative point of view. Although there was unsuccessfully presented to a Congressional committee a draft which would have expressly saved cases like Guessefeldt's from the bar of Section 39, the testimony in support of that draft was "meagre and unimpressive"; it was largely in written form and therefore less likely to have had any significant impact upon committee members. Moreover, the Court said, the question was not touched upon in floor debate. Finally, the rejection of Guessefeldt's contentions would require the decision of a debatable constitutional question, namely, whether the nationality of an alien is enough, without more, to cast him beyond the pale of constitutional protection against seizure of property without just compensation.

Chief Justice Vinson, joined by Justices Reed and Minton, dissented.

The dissenters rested upon the letter of Section 39, which "plainly forbids" the return of vested property to "any national" of Germany and Japan, and upon the syllogism that Guessefeldt was a German national because he was a German citizen and because nationality is to be equated with citizenship. The minority scouted the reality of the constitutional question which the Court held to be "debatable" and "not imaginary": the Constitution permits the summary deportation of nationals of a nation with which we are at war (*Ludecke* v. *Watkins,* 335 U.S. 160); it must likewise permit the confiscation of his property.

Mr. Justice Clark did not participate.

UNITED STATES V. NEW WRINKLE, INC.

(February 4, 1952)

Two manufacturers of "wrinkle finish" paint combined their patents by assigning them to a new corporation (New Wrinkle) which had no function other than the issuance and enforcement of patent licenses. All of the New Wrinkle licensees were required to adhere to nearly identical minimum price schedules. The Court held that New Wrinkle was within the reach of the federal power over interstate commerce. It held also that although a patentee may fix the price at which his licensee may sell, he may not enjoy the double benefits of cross-licensing *and* price fixing when the effect is to fix prices throughout an entire industry.

The United States instituted civil proceedings in the Southern District of Ohio against New Wrinkle and the Kay & Ess Co., charging that the defendants had violated Section 1 of the Sherman Act by conspiring to fix uniform minimum prices and to eliminate competition in the manufacture of paint which, when applied and dried, produces a hard wrinkled surface. The District Court dismissed the complaint without opinion, but the Supreme Court, speaking through Mr. Justice Reed, unanimously reversed.

Prior to and during 1937, the Chadeloid Chemical Co. and defendant Kay & Ess had been litigating the question which of the two companies held the controlling wrinkle finish patents. The dispute was resolved by contract, each former adversary taking stock in a new corporation, New Wrinkle, in exchange for assignments of their patents. New Wrinkle had no manufacturing functions; its operations were restricted to the issuance and enforcement of patent licenses containing agreements which fixed the minimum prices at which licensees might sell. The price-fixing schedules were not to become operative until twelve of the leading producers of wrinkle finishes had subscribed to them. When the complaint was filed in 1948, more than 200 manufacturers, or substantially all of those engaged in producing wrinkle finishes, held nearly identical licenses from New Wrinkle. Prospective licensees had been advised of the price restrictions

and assured that like advice was being given to other manufacturers "in order to establish minimum prices throughout the industry."

Just as a similar contention had been rejected in *Lorain Journal Co. v. United States,* 342 U.S. 143 (1951), the Court rejected the contention that New Wrinkle was not subject to the Sherman Act because it performed no function other than the execution and enforcement of license contracts. Even though the isolated act of contracting may take place wholly within a single state and may not itself be interstate commerce, a contract is within the reach of the Sherman Act if it is part of a scheme to restrain interstate commerce.

The Court rejected also the contention that the licenses at bar were permissible under *United States v. General Electric Co.,* 272 U.S. 476 (1926) and *Bement & Sons v. National Harrow Co.,* 186 U.S. 70 (1902). Although those decisions permit a patentee to fix the price at which his licensee may sell, they do not sanction price control through cross-licensing: patentees in the same patent field may not combine their valid monopolies to secure mutual benefits for themselves through fixing the sale price of the patented device. But for the fact that New Wrinkle was not engaged in manufacturing, the arrangement at bar is similar to that which was condemned in *United States v. United States Gypsum Co.,* 333 U.S. 364 (1948).

Mr. Justice Clark did not participate.

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INSANITY AS A DEFENSE TO CRIME

> *"The law is the last result of human wisdom, acting upon human experience for the benefit of the public"*
> SAMUEL JOHNSON

Legally sane but medically insane is a catchword which makes for an increasing confusion in the administration of criminal justice. Legal insanity has been defined as a disorder of the intellect and distinguished from moral insanity, a disorder of the feelings and propensities.

It has been more than a century ago that the rules in the McNaghten Case were laid down. To continue to follow a "right and wrong test" enunciated in 1843 despite the growth of the science of psychiatry would mean that the Common Law is unable to adjust its rules to medical knowledge.

The two great professions of law and medicine must move together in this field of medical jurisprudence.

This checklist which is the second in the series entitled LAW AND MEDICINE* includes the latest literature on this problem.

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